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Human Rights Visionary Hersch Lauterpacht

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Human Rights *visionary*

Hersch Lauterpacht

By A. W. Brian Simpson

The following essay is based on the Lauterpacht Memorial Lecture that the author delivered last fall at the British Institute of International and Comparative Law. A version of this essay also is forthcoming as "Hersch Lauterpacht and the Invention of the Age of Human Rights" in 119 Vol. 1 Law Quarterly Review *(January 2004). Hersch Lauterpacht, who died in 1960, was a Cambridge professor and renowned international law scholar whose ideas influenced worldwide development of notions of human rights.*

In May 1954 a replacement had to be found for Sir Arnold McNair, who did not wish to continue on the International Court of Justice. The British Foreign Office got in touch with the Lord Chancellor, the awful Lord Simonds, who took the view that no English judge would take the job since the pension was inadequate.

The Minister of State, Selwyn Lloyd, wrote to him on the subject, pointing out that there were a number of possible candidates among academics — their pension arrangements were no problem. The letter explained that "of these, by far the most eminent is Professor Hersch Lauterpacht, Q.C., of Trinity College Cambridge. He is not British by origin, but he has been naturalized for more than 20 years, and continuously resident in the country upwards of 30. He is very much liked by all who know him, and despite his continental origins, his outlook on legal matters reflects mainly the Anglo-Saxon approach. Owing to his origins, he would not perhaps be what we should regard as entirely sound from our point of view on matters of human rights; that is to say, his bias would be to take perhaps too wide a view on the topic. However, irrespective of the character of the British judge this is a subject which we would always wish to keep away from the court, in any event. Therefore, I doubt whether the point matters."

How did it come about that Hersch Lauterpacht, then the Whewell Professor of International Law in Cambridge, achieved the distinction of being considered not quite "sound" by the Foreign Office on human rights?

The story begins at a 1942 meeting of the Grotius Society, the only British intellectual institution then existing that brought together academics and practitioners. Lauterpacht addressed the society on December 7, 1942, on "The Law of Nations, the Law of Nature, and the Rights of Man." He argued that although the conception of the law of nature long predated explicit reference to the existence of natural and inalienable rights, yet in substance theories of natural law had, even in the ancient world, incorporated ideas that were, in the Enlightenment, to find expression in assertions of individual rights. He concluded his paper by arguing that "if the enthronement of the rights of man is to become a reality, then they must become part of the positive law of nations suitably guaranteed and enforced."

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So far as I am aware, this was the first paper or lecture ever devoted to this subject and delivered in England, either before a learned society or in a university setting. Rare exceptions apart, such as the Catholic Richard O'Sullivan, common [common law system] lawyers of this period had not the slightest interest in theories of natural law, or in the enunciation, for use in domestic law, of catalogues of individual natural rights, much less in their international protection.

One wonders what induced Lauterpacht to choose so unpromising a topic? The clue is the reference to "the enthronement of the rights of man." This refers to a message that had been given by Winston Churchill to the World Jewish Congress in October 1942, when he had referred to "the enthronement of human rights" as a war aim. It is, I think, pretty obvious that growing knowledge of what was happening to the European Jews underlay his choice of subject. The *Jewish Chronicle* reported the murder of two million Jews on December 11, 1942, and on December 17 Anthony Eden made a statement in the House of Commons, the House rising to stand in silence in response to this. The nation state had signally failed to provide protection; the international community must fill the breach.

Lauterpacht's legal writings adopt a severely professional style, and his paper, typically, makes no reference to the horrific events that were, at the time, overtaking the European Jews, and indeed his own family back in Poland. Only a niece was to survive the war; his parents, his brother and sister, and all but one of their children — I do not know how many there were — were murdered, and in all probability already had been murdered. When he learned of their fate I do not know, but by April 1946 he must have received some information, since he was involved

in obtaining a visa for his niece to come to England. It is characteristic of Lauterpacht that his first essay on the subject of human rights is of a theoretical rather than a practical nature.

The Grotius Society was not to return to the position of the individual in international law until 1944, when Vladmir R. Idelson read a paper on "The Law of Nations and the Individual." Idelson, a Russian Jew by extraction, was a highly successful King's Counsel in practice at 13 Old Square, Lincoln's Inn. It was Lauterpacht who responded to Idelson's paper, and introduced the subject of the international protection of human rights. Idelson had directed his paper in part to discussion of the hoary old dogma that individuals were merely the objects of international law, not the subjects. Lautherpacht thought perhaps too much attention was devoted to this dogma:

". . . if international law were now to provide for the so-called fundamental rights of man by means of an international convention enforceable at the instance of states, I suppose we would say that individuals would be the objects of international law, but I am not sure that would be a very satisfactory achievement. It could not be the final achievement. This must consist in the recognition of the natural rights of man — his right to equality, to freedom of opinion and expression, to personal freedom conceived as the right to government by consent — as an enforceable part of the law of nations."

In response to Idelson's paper, a committee was set up under Lord Porter to consider international law and the rights of the individual. It reported on June 3, 1945, recommending an attempt to proceed along the lines of the International Labor Organization by small stages.

Lauterpacht was not, however, involved in this initiative. Instead, he had been writing his book on the subject and drafting an international bill of rights. By the autumn of 1943 Lauterpacht had largely completed his book, *An International Bill of the Rights of Man*, published by Columbia University Press in 1945 with financial support from the American Jewish Committee. By the time it appeared, the notion that the protection of individual rights was a war aim had become widely accepted. The book included the text of Lauterpacht's bill. During the war, a number of bills of rights had been produced and published, notably by H.G. Wells and Ronald MacKay in 1940, and by a committee of the American Law Institute in February 1944, so Lauterpacht's bill was not the only one offered.

But nobody had ever published an up-to-date study of the subject that not only embodied clear and specific proposals as to the contents of a bill of rights, but also seriously addressed the question of what was to be done with such a bill of rights once its substance was settled, and faced up to the grave problems that were bound to confront an attempt to establish institutional mechanisms for implementing such a bill. Lauterpacht's book was innovative in that it faced up to problems of implementation and proposed solutions.

The approach Lauterpacht adopted was radically different from that which was to prevail within the Foreign Office, under the dominating influence of the Legal Adviser, Eric Beckett. Beckett had a bee in his bonnet about considering issues in what he thought was the correct order. He took the line that the first issue to be addressed, if any progress was to be made, was the definition of the rights and their limitations. Only when this had been achieved should issues of implementation and enforcement be considered.

Lauterpacht began at the other end; the critical issue was to settle what institutional arrangements could and ought to be established if the international protection of human rights was ever to become a reality. Definition was of secondary importance.

In his book, Lauterpacht argued that the avowed purpose both of the first and second world wars had been, to quote Churchill, "the enthronement of human rights." He explained the adoption of this war aim by the recognition that protection of fundamental rights and democracy was a prerequisite to international peace, a popular if slightly suspect way of linking human rights protection to the primary function of the United Nations organization. He argued for protection in international law, since no system of law, whether international or domestic, was "true to its essential function" unless it protected "the ultimate unit of all law — the individual human being." He argued that adopting an international bill of rights that did not impose international obligations would convey the false impression of progress, and be essentially a step backwards, and would even "come dangerously near a corruption of language."

He then, and this was typical in his work on the subject, spelled out, very pessimistically, the grave difficulties that were likely to impede the attempt, if it were to be pursued, to develop an obligatory international bill of human rights.

Lauterpacht was well aware of the traditional skepticism of English lawyers as to the value of abstract declarations of the rights of man. It would be difficult to overemphasize this skepticism, and worth remembering that half a century later the United Kingdom still did not possess a domestic bill of rights. So for the book he wrote an entirely new chapter, which is entitled "Natural Rights in British Constitutional Law and Legal Theory."

Lauterpacht argued that the reason, historically, why Great Britain was out of line with most other states was the result of the fact there had evolved a tradition of respect for English liberties which, as it were, made declarations of the rights of man seem unnecessary.

There was, he argued, no compelling reason why such a declaration of rights might not be adopted in Great Britain without it forming part of a comprehensive written constitution. He then addressed the problem of protecting such a declaration against parliamentary sovereignty, and the chapter concludes with a Delphic passage that does not really explain how this is to be brought about.

The text of an International Bill of the Rights of Man, together with a commentary upon it, appears in Part II of the book. At this time the United Nations as a political organization had not yet been established, but Lauterpacht assumed it would be. He envisaged that his bill would be adopted by the United Nations as "part of the fundamental constitution of international society and of their own states." His bill was offered as a legal document, not a political manifesto. So it was intended both to confer definite and enforceable rights and duties in international law between states, and to confer rights in international law on individuals.

It necessarily followed that it had to be enforceable by some form of international procedure, over and above whatever machinery existed in the domestic legal systems of states. Furthermore, its adoption would require a substantial sacrifice of state sovereignty, even though its provisions might conform to practices followed in civilized states already.

Lauterpacht approached the subject as a scholar, indeed as a legal scientist, qualified to work it all out for himself, and impose his views on the international community by the pure force of their own rationality. Far and away the most important part of his book is its treatment of enforcement of an international bill of rights. Lauterpacht's view on this was based on three principles:

- The first was that normal enforcement must be a matter for domestic law, and so incorporation of his bill into domestic law was to be mandatory.
- The second was that there must be established a permanent international authority, which would be concerned not simply with abuses of rights, but with ongoing supervision and monitoring. This body, he argued, must be neither a political body nor a judicial body; he rejected the idea of international judicial review as both impracticable and politically impossible.
- His third principle was that this authority must possess an ultimate and effective power to enforce the bill. Lauterpacht was opposed to the idea of a bill of rights whose enforcement would depend upon a right of individual state intervention. His solution was to place the international bill of rights under the guarantee of the United Nations and recognize it as an integral part of the law of nations.

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The United Nations was established in 1945, its charter contained numerous references to human rights, and the body that was going to be primarily involved was the Human Rights Commission. The powers of the organs of the United Nations with regard to the protection of human rights were, however, limited by Article 2 (7):

"Nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under chapter VII."

The massive body of papers in the Foreign Office archives on the significance of this provision bears witness to its profound and indeed intentional obscurity. But it certainly did not prevent the United Nations, once up and working, from drafting some form of international bill of rights, and indeed it was always assumed it would do so.

Given the fact that Lauterpacht was the only international lawyer of repute who had devoted serious attention to the idea of an international bill of rights, it might be expected that he would play some direct part in the United Nations negotiations. But this was not to be, and Lauterpacht was thereafter positioned as an outsider.

Nonetheless, Lauterpacht developed, from the summer of 1947 onwards, a powerful attack on the interpretation of the charter that was adopted by the Human Rights Commission, by the Economic and Social Council, and by Eric Beckett and the British Foreign Office, and which came to be accepted by the United States.

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charter placed a positive obligation on the United Nations to promote respect for human rights and fundamental freedoms, and their observance. The absence of a text spelling out what these rights and freedoms were did not deprive the text of the charter of practical significance. Human rights and fundamental freedoms were rather like elephants; you did not need a definition of an elephant to recognize one when you met it. This was particularly the case when gross abuses took place. The provisions in the charter referring to human rights meant that violations of human rights were no longer off limits as being matters essentially of domestic jurisdiction.

He argued that: "There is nothing in terms of its reference or in the charter to prevent the Commission, when confronted with a complaint, to prevent it from discussing it, from investigating it, and from making a recommendation or report on the subject — either in general terms or with specific reference to the state concerned — to the Economic and Social Council. There is nothing to prevent it from setting up an effective machinery for that purpose."

He also attacked the manner in which the Human Rights Commission was proceeding. In particular, the Human Rights Commission had no power to do anything at all about the numerous petitions that were already arriving from individuals and groups who imagined that the United Nations was in the business of actively protecting human rights. This view was adopted by the Economic and Social Council on August 5, 1947: ". . . neither the Commission on Human Rights nor the Commission on Women had any power to take any action in regard to complaints concerning human rights or the status of women."

So such petitions were merely stored away to collect dust in the archives.

Lauterpacht accepted none of this. His argument, first presented in a course at The Hague in the summer of 1947, was that the provisions in the

He also strongly criticized the decision that the members of the Human Rights Commission should be governmental representatives. This reproduced his idea that the monitoring body should be neither judicial nor political in character.

And he opposed the Commission plan first to draft a declaration of principles because he believed the adoption of a declaration without some means of enforcement would represent "mere lip service to a cause which was proclaimed as one of the major purposes in which the United Nations were engaged."

Excluded from direct involvement in the United Nations negotiations, Lauterpacht turned to the International Law Association when it held its first postwar conference in Cambridge in 1946. Among the attendees was Rafael Lemkin, inventor of the concept of genocide, and revulsion at the recent history of Europe was much in the air. Professor Paul de Pradelle read a paper on the possible modification of the United Nations Charter, and the conference adopted resolutions that the Charter should be amended to include "the fundamental and everlasting rights of personality, namely the right to possess a nationality, the right to justice, and the right of expressing fully every opinion." It also passed a resolution condemning executive detention in peacetime.

The next conference took place in Prague in September 1947, and Lauterpacht used the opportunity to set out his view in a paper delivered on September 2. He received support and the association adopted a number of resolutions calling on the executive committee to set up a committee or committees to study, in relation to human rights, the legal effects of the Charter and of Article 2 (7), the contents and enforcement of an international bill of rights, and the interpretation and enforcement of the human rights provisions of the peace treaties. The Secretary General was to be told that the Association thought the submission of a bill of rights to the General Assembly should be postponed until 1950, and proceeded by objective study. The Association also wished to associate itself with a declaration by the Economic and Social Council of June 21, 1946, that "the purpose of the United Nations with regard to the promotion and observance of human rights, as defined in the Charter . . . can only be fulfilled if provisions are made for the implementation of human rights, and for an international bill of rights."

In effect, Lauterpacht had hijacked the International Law Association. Two committees were established, one confined to study of the peace treaties. Lauterpacht became the *rapporteur* for

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the other committee, a general committee on human rights that had 30 members. Between September 1947 and January 1948 Lauterpacht worked on a report that in effect simply set out his views as stated in his Hague course. The report was formally adopted by the Association at its 43rd conference, in Brussels August 29 – September 4, 1948. But before this, Lauterpacht also submitted his preliminary report to the Commission on Human Rights, and thus became more closely involved in the United Nations negotiations. This is the most trenchant statement of his views on the interpretation and significance of the Charter:

- His report argued that the Commission was wrong in its 1947 resolution that it possessed no competence to take action over petitions. It could take any action short of intervention.
- Commission composition is wrong: "The Commission is unlikely to attain the full stature of moral authority and practical effectiveness unless, in addition to any representatives of governments, it includes private individuals chosen irrespective of their nationality, through a selective process which in itself would provide a guarantee of impartiality."
- Enforcement is the crucial problem for an international bill of rights. While a mere declaration might be useful "as an expression of deep historical experience and of the moral sense of mankind," such a declaration without any enforcement mechanisms "would foster the spirit of disillusionment and, among many, of cynicism. The urgent need of mankind is not the recognition and declaration of fundamental human rights but their effective protection by international society."
- He attacked the Commission's decision to draft a convention to which states that wished to could accede. This would be useless unless it embodied means of enforcement and was adopted by many countries.

At this point there existed a United Nations draft declaration and a draft covenant. Lauterpacht had no use at all for either, but he did not criticize the texts in detail, basically because he thought the way in which the operation had been conducted was fundamentally misconceived — his idea was that a body of expert international lawyers would undertake the task of studying and drafting, the Commission providing guidance of a political nature. One can only speculate, but I think it is clear that Lauterpacht wanted to be one of the international lawyers engaged in this work. His presentation to the United Nations of his own draft was a way of showing his fitness for the task, and by working as *rapporteur* through and with the support of the International Law Association he could present his views as being supported by at least most of the world's expert international lawyers. The timing was unfortunate in that his report had not yet been formally adopted, but that could not be helped, and he must have thought it urgent to persuade the Commission to amend its ways. But from a political point of view all this had, nevertheless, come far too late; there was not the least hope that the Economic and Social Council would engage in some radical transformation of the way in which it and the Human Rights Commission would go about their business, or the assumptions under which the work of drafting the bill of rights would proceed. Had the U.S.A. or the U.K., or even I suppose the U.S.S.R., adopted his views the story might have been different, but none of them did. Conceivably adoption by a number of the lesser powers might have been sufficient. But this did not happen, and the Commission continued as before. His was a voice crying in the wilderness.

In 1948 a new opportunity for Lauterpacht to become directly involved in human rights negotiations began to develop. In May of that year The Hague Congress was convened, an unofficial gathering organized by the European Movement that was pressing for the establishment of a federal Europe. This called for the establishment of a parliamentary assembly, and for the production of a European charter of human rights. Partially in response to the pressure from federalists, the Council of Europe was established in March 1949. The European Movement held another conference in Brussels in 1949. Lauterpacht attended, along with three other lawyers from England, one being the American Arthur Goodhart, and the others David Maxwell-Fyfe, whom Lauterpacht would have known from Nuremberg days, and J. Harcourt Barrington.

The Hague Congress had established a juridical commission, the Drapier Commission, and in March 1949 it put forward proposals for a Charter of Rights and a European Court of Human Rights. Lauterpacht was certainly involved in the work of the Commission, but did not, so far as I have been able to discover, play a particularly active role; he probably merely acted as a consultant, like a number of other jurists. As with the practical United Nations negotiations, and earlier with the Grotius Society's Porter Committee, he remained essentially an outsider, and perhaps this was by choice. Most of the work was done by Harcourt Barrington, who was paid 100 guineas, which he received, in conformity to English legal tradition, after prolonged delay.

On July 9, 1949, after establishment of the Council of Europe on March 17, 1949, the Brussels proposals were considered at a meeting of the Grotius Society, and Lauterpacht read a paper on "The Proposed European Court of Human Rights."This meeting was attended by Harcourt Barrington, who, referring to the scheme of enforcement, paid tribute to Lauterpacht:

"I would like to take the opportunity of acknowledging our great debt to him, because we did quite shamelessly borrow many ideas from his draft Covenant on the Rights of Man prepared for the International Law Association in 1948."

He further explained that "there is a body of opinion I favor of having the rights described very shortly with a view to building up by judicial decisions as we go along a kind of common law on the subject, and there is another body of opinion which favors a detailed definition of the rights. As far as the draft is concerned, those who favor a short description have prevailed."

Lauterpacht's paper commented on the proposals and repeated his view that "an international court, conceived as the primary or exclusive instrument for the enforcement of human rights, is neither practicable nor desirable." But he was prepared to go along with the Brussels scheme because the center of gravity lay with the Commission: "The jurisdiction of the European Court would thus be in effect of a residual character. It would be invoked only after the means of settlement had failed."

It is clear that the institutional structure that eventually emerged in the European Convention was partially derivative of Lauterpacht's draft Convention. And, whether the Foreign Office liked it or not, there was established both a meddling Commission and a Court of Human Rights. But the capacity of the Commission to meddle, and of the Court to invade state sovereignty, were much reduced by making acceptance of the right of individual petition, and the jurisdiction of the Court, optional. Even so, to the horror of ministers, colonial civil servants, and Field Marshal and Governor Sir John Harding, the United Kingdom was subjected to serious meddling indeed, including an on-the-spot investigation over the methods used to suppress the EOKA [Greek Cypriot group favoring union with Greece] insurrection in Cyprus in 1955–59.

If we believe the judges in Strasbourg, and I am not suggesting that we do not, human rights violations are taking place in all the Western democracies, as well as in Central and Eastern Europe, not to mention the former Soviet Union, on a daily basis, and this is only partially the result of moving the goal posts by interpreting the Convention as a living instrument. Absolutely nobody thought that this was the situation in the 15 signature states back in 1950, and Lauterpacht was certainly not an exception to the general mood of self-congratulatory optimism. He never imagined that the Strasbourg institutions would become intrusive. One wonders what he would have made of Strasbourg of today, with Secretariat and Court at risk of destruction in part by the living instrument they have developed, and by the huge extension of the coverage of the Convention, as well as by the use of the Convention by individuals who, back in the 1950s and even the 1970s and 1980s, would have simply accepted their lot.

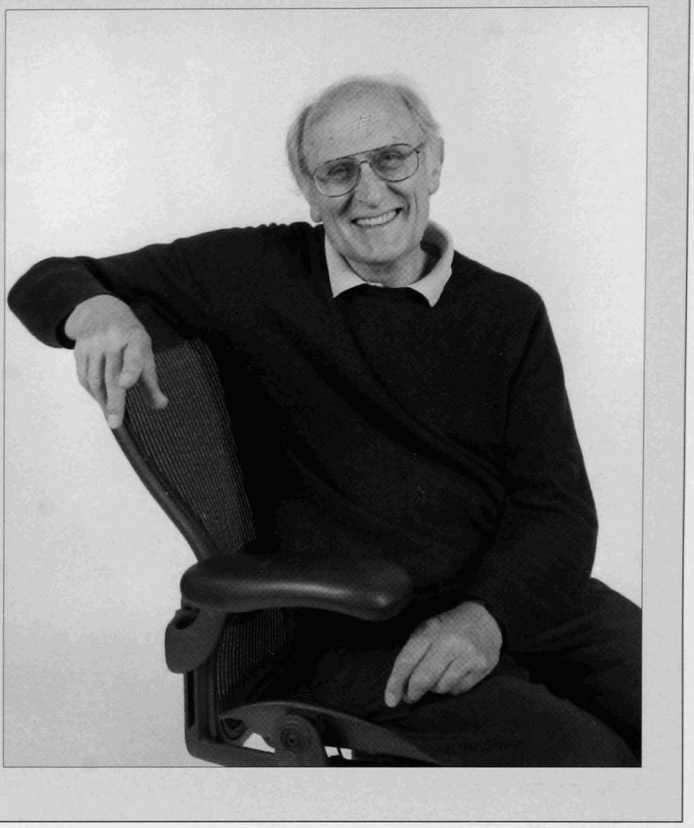
So far as the United Nations negotiations were concerned, Lauterpacht was never to play any direct role in them; he was involved in the International Law Commission between 1951 and 1954 on the law of treaties, and in 1954 he became a judge on the International Court of Justice. He died in May 1960.

So, at the end of the day, what is one to say about Lauterpacht's role in all this? I feel that Sir Gerald Fitzmaurice got it more or less right in a talk published in the *British Yearbook of International Law* in 1979:

"A few words, first, of a personal nature recalling Sir Hersch Lauterpacht's work on human rights, in the course of which he did so much to turn that subject from something of a largely ideological character — more an aspiration than a reality — into a judicial concept having practical possibilities. It is certain, however, that his preoccupation with it sprang from a different part of his personality from that which made him — by any reckoning — one of the most eminent jurists of our time, and without a peer in the international field. Some of his preoccupation must have derived from his origins in Austrian Poland in the years before World War I."

The basic claim that Lauterpacht's contribution was to establish, by an analysis of options and problems, the practical possibility, given appropriate institutions, of the international

protection of individual human rights is surely right. As he several times said, the core of the problem of human rights was enforcement. He would surely have been pleased that the Strasbourg Court has so often insisted that remedies for the violations of human rights must be practical and effective, not theoretical or illusory. And, as I hope I have shown, he, albeit always an outsider, played a significant part in laying the foundations of the European system that has shown itself capable of achieving this ideal.



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